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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ST. CHARLES
and FRED T.L. NORRIS, Mayor,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION,
KATHRYN GIUNTOLI and JOAN MARKLEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE CHRISTMAS CROSS COMMITTEE, AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE CHRISTMAS CROSS COMMITTEE, AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE *

The members of the Christmas Cross Committee of St. Charles are gravely concerned with the lower court decisions regarding the Christmas cross, its symbolic religious meaning, and its relation to their guarantees of freedom set forth in the First Amendment. Amicus believes that this case raises dire issues concerning: 1) the role and operation of religion in government; 2) conflict between the religions of Christianity and Secular Humanism in government; 3) countervailing rights inherent in the First Amendment; 4) the caselaw doctrine of separation of church and state; and 5) the role of the judiciary with respect to the democratic process and ecclesiastical matters in government. Moreover, this case will affect the display of any religious symbolism in all aspects of public life, and threatens to completely undermine the sovereignty of our nation established by our Founding Fathers.

The Christmas Cross Committee of St. Charles is a not-for-profit Illinois corporation, which represents the interests of over 4,000 citizens of St. Charles who have signed petitions in support of the effort by the Committee to preserve the City's traditional Christmas display. The Christmas Cross Committee of St. Charles was formed by a group of residents of St. Charles in response to the action by the American Civil Liberties Union to enjoin the City from illuminating the cross portion of its six-acre Christmas holiday display.

* Counsel of record to both parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

Attorney for Amicus Curiae, Terrence M. Spears, is affiliated with Christian organizations dedicated to the protection of religious liberties under the United States Constitution. Attorney for Amicus has participated in First Amendment seminars concerning religious freedoms, and has authored several articles concerning the Religion Clauses of the First Amendment. Amicus Curiae believe that the expertise of its counsel will be of assistance to the Court in this case, and will, in particular, provide this Court with enlightenment concerning the religious heritage of our nation. This brief is filed to provide the Court with the views of the Amicus Curiae on the issues in this case relating to the Establishment Clause of the First Amendment.

STATEMENT OF FACTS

Amicus Curiae adopt by reference the facts presented in the Brief filed by petitioner with this Court. It should be emphasized that the cross appeared 1) in the overall context of a City-sponsored six-acre Christmas celebration display, 2) it appeared only temporarily during the Christmas season for at least 15 years, and 3) although it was placed on public property, the cost of the cross and the costs incurred with its display were *de minimus*, both in comparison to the total cost of the several City displays and in comparison to the annual budget of the City. This Court may find the setting and context important in viewing the challenged activity under the Establishment Clause of the First Amendment.

SUMMARY OF ARGUMENT

This Court has adhered to the view that to give concrete meaning to the Establishment Clause, "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of our Founding Fathers. History makes clear that our Founding Fathers did not seek to found our nation upon the basis of secularism, nor did they perceive as a goal, a continuous process of removing religious expression from our government. History, in fact, reveals that we are a Christian nation, founded upon Biblical principles. Our Founding Fathers encouraged and participated in the free expression of the Christian faith in government and accommodated all liberties of conscience of men, except where compromise would threaten the very foundation of our nation, the sovereignty of God over our nation.

The historical evidence regarding the Framers' view should not be discarded when, as this Court has recognized, they played such a leading role in shaping the Constitutional guarantees of religious freedom in our nation. The Framers would have been appalled that the First Amendment could be utilized to prohibit the practice in question here.

Where religious expression exists in government, (whether by practice or by symbolism) it must necessarily take some form which is advanced or promoted over other form(s) of religion. Freedoms cannot be absolute in the sense that anyone who claims the right in any instance must have it honored. The documents upon which our nation's foundations rest clearly acknowledge and proclaim that we believe in a Supreme Being, who is sovereign

over our nation, and He is the source of our rights and freedoms in government.

The religions of Christianity and Secular Humanism (neutralism) are mutually exclusive in the instant case, in the sense that one cause, belief, or faith must be endorsed or advanced at the complete expense and denial of the other. The removal of the cross and the denial of the right of the citizens of St. Charles to proclaim their faith in government as intended by the Founding Fathers, will result in the courts establishing the religion of Secular Humanism in our government nationwide. Our Founding Fathers did not see fit to "accommodate" or "tolerate" unbelievers with respect to the sovereignty of our nation, yet the courts have chose to advance the interests of the same, who assert a right to freedom *from* speech in government.

The Framers intended that the First Amendment protect religious liberties by keeping government out of religion, not religion out of government. The display of the cross at Christmas not even remotely suggests a step toward an establishment of religion as feared by the Framers of our Constitution.

The *Lemon v. Kurtzman* test is an inappropriate standard to measure First Amendment freedoms in light of the intentions of the Framers of the Constitution. Even so, the Christmas display satisfies the *Lemon* test as it serves the secular purpose of announcing the Christmas holiday, it only remotely advances the Christmas religion in general as intended by the Framers, and it causes no entanglement problems. The decision of the Court of Appeals conflicts with both the intentions of the First Amendment and with fundamental Constitutional principles and should therefore be reversed.

ARGUMENT

I.

THE CHRISTMAS DISPLAY IN ST. CHARLES IS CONSTITUTIONAL UNDER THE FIRST AMENDMENT WITH RESPECT TO THE INTENTIONS OF THE FRAMERS OF THE UNITED STATES CONSTITUTION.

From our nation's inception, our Founding Fathers established our governments upon a Judeo-Christian foundation. The Framers of the Constitution acknowledged our Creator in official documents and official observances throughout the history of our nation. This foundation and these practices were meant to last for ourselves and for our posterity. There is a wealth of historical data which sheds much light upon the intentions of the Framers and the meaning of the First Amendment with regard to religious expression in government. The record demonstrates that the Framers authorized and participated in many religious observances and activities that had a far greater impact than the display of the cross by the City of St. Charles. Thus, it is the Court of Appeals decision below, not the display in issue, that conflicts with long-standing First Amendment values.

A. The Founding Fathers Of America Established Our Government Upon A Judeo-Christian Foundation And Embraced The Free Expression Of The Christian Faith In Government.

In the past, this Court has examined all the documentation concerning the foundations of our nation, and it was held that we indeed, are a Christian nation. *Church of*

the Holy Trinity v. United States, 143 U.S. 457 (1982)[1] While Christianity is not the legal religion of the state as established by law, the fact that "Christianity is a part of the law of the land," is everywhere prominent in all our civil and political history, and has been, from the first, recognized and acted upon by the people, as well as by Constitutional Conventions, by Legislatures, and by courts of justice.[2] The documents upon which our nation was established clearly acknowledge and proclaim that America is not a country whose government is based in neutralism or "secularism," but that we are a religious people whose institutions presuppose a Supreme Being. *Zorach v. Clauson*, 343 U.S. 306 (1952)

The Declaration of Independence specifically states in part that:

> "all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness."[3]

We believe, as did our Founding Fathers, that our rights of liberty originate and flow from our Creator. The United States Constitution, dated as the year of "Our Lord" in 1787, claims protection for our ". . . Blessings of Liberty . . ." for ourselves and for our posterity.[4] The Illinois Constitution also depicts manifest reverence for our Creator where it states in part:

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[1] See also, C. Gregg Singer, *A Theological Interpretation of American History*, p. 284 (1969), Alex de Toqueville, *Democracy in America*, p. 291 (1835-1840) reprint (1961), John W. Whitehead, *The Second American Revolution*, p. 95 (1982).

[2] Carl Zollman, *American Church Law*, p. 27 (1933).

[3] The Declaration of Independence, para. 2 (U.S. 1776).

[4] U.S. Const. preamble.

> "We, the People of the State of Illinois—grateful to Almighty God for the civil, political and religious liberty which He has permitted us to enjoy and seeking His blessing upon our endeavors— . . . . . do ordain and establish this Constitution for the State of Illinois."[5]

The documents set forth above and history in general, supports the conclusion that our Founding Fathers did not see fit to "accommodate" or "tolerate" unbelievers, (i.e. Atheists, Agnostics, Human Secularists, and others) with respect to our sovereign form of government. The Founding Fathers saw all the consequences in the principle, and they avoided the consequences by denying the principle. *Everson v. Board of Education*, 330 U.S. 1, 65 (1947) Our Founding Fathers well understood from the Scriptures that our sovereign form of government could not be synthesized with, or compromised by, religions which operate in a neutral fashion with indifference or exclusion to Christian theism.[6] Any attempt to do so would deny the sovereignty of God over our nation. The Founding Fathers understood the consequences and bondage a nation might face should it deny or turn from God's sovereign protection.[7]

The focus of the Constitution was not the erradication of religion from public life. History makes clear that our Founding Fathers did not seek to found our nation upon the basis of secularism, nor did they perceive as a goal, a continuous process of removing existing religious expres-

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[5] Ill. Const. preamble (1970).

[6] Francis A. Schaeffer, *A Christian Manifesto*, p. 34 (1982), George Washington: Farewell Address, Sept. 19, 1796.

[7] Marshall & Manuel, *The Light and the Glory*, p. 349 (1977), William Johnson, *George Washington, The Christian*, pp. 69, 70 (1919).

sion from our government. In fact, our Founding Fathers participated in and authorized many religious observances in government.[8] The Framers believed that religious expression, freedom and education were vital to the foundations of our nation.[9]

Universally, the oath of office for Presidents has been administered upon the Bible. Each of our Presidents, from George Washington to the present Chief Executive has, upon assuming his office, asked for the protection and help of God, our nation's sovereign. *Engel v. Vitale*, 370 U.S. 421 (1962) James Madison, "Father of our Constitution," is often cited for his strong commitment to separate church and state, however, even he believed that it would be impossible to govern without God and the 10 Commandments.[10] George Washington also believed that it would be impossible to govern without God and the Bible.[11]

The same Congress that gave us the Constitution also gave us the Northwest Ordinance which provides in part:

> "Religion, morality, and knowledge being essential to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[12]

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[8] *Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952), *Lynch v. Donnelly*, 465 U.S. 668, 675-77 (1984).

[9] *Ordinance of 1787*, July 13, 1787, Art. 3, reprinted in *Documents Illustrative of the Formation of the Union of American States* 52 (1927).

[10] Gary DeMar, *God and Government, A Biblical and Historical Study*, Vol. 1, pp. 137-38 (6th ed. 1984).

[11] Letter from George Washington to Lee, (Oct, 31, 1786), Burton Stevenson, *The Home Book of Quotations, Classical and Modern*, (10th ed. 1967).

[12] *Ordinance of 1787*, July 13, 1787, Art. 3, reprinted in *Documents Illustrative of the Formation of the Union of American States* 52 (1927).

Examples of the free expression of religion in government embraced by our Forefathers are numerous and varied enough to ascertain that our Founding Fathers endorsed, promoted and encouraged the Christian religion in every aspect of our society and its government. Washington, as President, issued proclamations calling for observance of Thanksgiving, fasting, and prayer.[13] As a congressman, Madison endorsed these proclamations.[14]

Religious symbolism in government is an integral part of our deeply religious cultural heritage. "In God We Trust" is printed on our coins and currency. Government stamps display religious messages. Carols and hymns are sung on government property. Government run museums and cemeteries hold and display religious symbols and artifacts. Nativity scenes are displayed on government property during the Christmas holidays. *Lynch v. Donnelly*, 465 U.S. 668 (1984) Public law #97-280 declared the year 1983, "The Year Of The Bible."[15] The St. Charles Christmas display is consistent with endorsements made by our Founding Fathers, and the people of St. Charles should have the same rights to be free to proclaim their faith in government.

B. The Christmas Cross Display Does Not Approach An Establishment Of Religion Feared By The Framers Of The First Amendment.

This Court has adhered to the view that to give concrete meaning to the Establishment Clause, "the line we

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[13] R. Cord, *Separation of Church and State: Historical Fact and Current Fiction*, pp. 25-26 (1982).

[14] *Id.* at 25-26.

[15] *Joint Resolution authorizing and requesting the President to proclaim 1983 as the "Year of the Bible,"* Pub. L. No. 97-280, 96 Stat. 1211 (1982).

must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of our Founding Fathers. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) The early settlers of this country came here from Europe to escape bondage of laws which compelled them to support and attend government favored churches. *Everson v. Board of Education*, 330 U.S. 1 (1947) While forced support and forced worship are not the only evils addressed by the First Amendment, our courts have dramatically departed from the original intentions of the Framers in cases involving First Amendment freedoms. The Framers fundamentally intended that the First Amendment protect against the establishment of a "national" Christian church denomination and that religion be protected from government intervention.[16] In the European tradition, establishment of religion meant that one denomination was given special, privileged status and became the sole recipient of state tax monies. Other religious affiliations were labelled as dissenters and were either tolerated or declared to be illegal. Those who refused to conform to the practice and rituals of the established church were subjected to harassment, fines, imprisonment, and even destructions of persons and property. Such harsh treatments were well-known to many colonists, causing them to incorporate into their constitutions, public statements guaranteeing religious toleration.[17] These observations are not intended to demean the rights alleged by respondents herein, nor does this point question the sincerity of those allegations, however, although

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[16] John W. Whitehead, *The Second American Revolution*, p. 96 (1982), Francis A. Schaeffer, *A Christian Manifesto*, pp. 34-35 (1982).

[17] DeJong & VanDerSlik, *Separation of Church and State, The Myth Revisited*, p. 51 (1985).

we are a nation which prides itself on recognizing the rights of the individual, the afflicted, and minorities, we have always preferred to protect freedoms of speech rather than impose restraint or censorship of religious expression in government. Just because I object to the form of a prayer used by a public leader in government, does not give me the right to prohibit him from praying in public.

The Framers well understood the danger of an oppressive, restrictive state which might force worship and support of a "national" church, and therefore, provided that the First Amendment specifically limit the power of the Federal government in the areas of: freedom of religion, speech, press, and assembly. At the same time however, the Framers realized the importance of the basis of religion in government. George Washington accentuated this sentiment in his farewell address when he stated:

> "Of all the dispositions and habits which lead to political prosperity, religion and morality are indespensible supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these finest props of the duties of men and citizens."[18]

Religious freedom, the liberty of conscience inherent in the Reformation heritage of the Framers, forms the basis for the exercise of our other freedoms.[19]

If we are to give correct meaning to the Establishment Clause, we must view the First Amendment in terms of the intentions of the Framers of our Constitution. The Founding Fathers defined religion in terms of Judeo-

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[18] George Washington: Farewell Address, Sept. 17, 1796.

[19] John W. Whitehead, *The Second American Revolution*, p. 94 (1982), Francis Schaeffer, *A Christian Manifesto*, pp. 32-34 (1982).

Christian theism, which was considered the basic foundation for freedom.[20] The philosophical base of the First Amendment was that of denominational pluralism—a healthy coexistence between the various Christian denominations.[21] The basis for measuring First Amendment freedoms then, in order to accurately reflect the intentions of the Framers, must take into consideration this foundational Christian freedom, even if the religious diversity in our nation has dramatically evolved since the drafting of the Constitution. In support of this interpretation, Justice Story, who served on this Court from 1811 to 1845, wrote:

> Probably at the time of the adoption of the Constitution, and of the first amendment to it . . . the general if not universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not compatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation if not universal indignation. . . The real object of the amendment was not to countenance, much less advance, Mahometanism, Judaism, or infidelity, by prostrating Christianity; but exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a heirarchy the exclusive patronage of the national government.[22]

Viewed in terms of the intentions of our Founding Fathers, the cross display in St. Charles does not approach an establishment of religion feared by the

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[20] John W. Whitehead, *The Second American Revolution*, p. 94 (1982).

[21] *Id.* at 96 (1982).

[22] Joseph Story, *Commentaries on the Constitution of the United States*, 2 vols., 2:593-95 (2d ed. 1851).

Framers. The cross display does not constitute or approach the forced support or worship of a "national" Christian denomination. There are so many creeds and denominations of Christianity, that the cross display in St. Charles cannot be said to endorse or promote one sect or creed of Christianity over another. If this Court truly followed the course charted by our Founding Fathers, there would be no conflict between Christians and the "sect of unbelievers" in government. *But see, City of St. Charles v. ACLU,* 794 F.2d 265 (7th Cir. 1986)

The issues in this case provide this Court with an opportunity to re-examine the proper contours, purpose, and focus of the Establishment Clause as the Framers intended the First Amendment be applied in our government. It is readily apparent from history and prior case-law, that our Founding Fathers did not intend the systematic removal of all vestiges of the Christian religion from our government. This very Court has upheld in the past, the practice of actual Christian worship in government, fully endorsed and supported by the State. *Marsh v. Chambers,* 463 U.S. 783 (1983) On the basis of the historical record and the intentions of the Framers of the Constitution, the symbolic proclamation of the same faith endorsed by our Founding Fathers, in the form of a cross in a Christmas display, set forth and maintained on government property through private support, hardly qualifies as an establishment of religion feared by the Framers of the Constitution. On the contrary, the forced removal of the cross by the lower courts and the forced "neutrality" endorsed by the courts in general regarding religious expression in government, has significantly approached an establishment of the religion of Human Secularism on a national scale, an appalling predicament in light of the discernment and sacrifices of our Founding Fathers.

II.

OUR FOUNDING FATHERS WOULD VIEW A NEUTRAL PREREQUISITE OF SECULARISM RESPECTING THE PURPOSE AND MEANS OF RELIGIOUS EXPRESSION IN GOVERNMENT AS AN UNCONSTITUTIONAL ESTABLISHMENT OF THE RELIGION OF SECULAR HUMANISM.

A. The Christmas Display In St. Charles Represents Our Freedom In Democracy To Exercise Religious Speech In Government As Intended By The Framers Of The First Amendment.

Where religious expression exists in our government, (whether by practice or by symbolism) it must necessarily take some form which is endorsed, advanced, or promoted over some other form(s) of religion. Our Founding Fathers were not neutral when they established this nation. The documents upon which our nation's foundations rest clearly acknowledge and proclaim that we believe in a Supreme Being who is sovereign over our nation, and He is the source of a person's rights and freedoms in government. The Framers did not see fit to "accommodate" or "tolerate" unbelievers with respect to the sovereignty of our governments, yet our courts continue to advance the interests of the same, who assert a right to freedom *from* speech in government. The people of the United States made the Constitution, and they made it exactly as we have it, in the words that are familiar to us, and the Court has no power to substitute for any of its clauses neutral principles that have not been adopted by the method of amendment which the Constitution provides.[23]

The religions of Christianity and Secular Humanism (neutralism) are mutually exclusive in their reach and dominion. As this case represents, one cause, belief or

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[23] Milton R. Konvitz, *The Constitution or Neutral Principles?*, An essay in the publication entitled, *Religion and the Public Order*, p. 113 (1963), George Washington's Farewell Address, Sept. 17, 1796.

faith must be advanced or promoted at the complete expense and denial of the other. Human Secularism is a form of Atheism or Agnosticism which makes the meaning of the maxim, "Exclusio Unius Est Exclusio Alterius" (The inclusion of one is the exclusion of another) all too clear. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

The Fourteenth Amendment did not strip the States of their power to meet problems previously left for individual solution. *Everson v. Board of Education*, 330 U.S. 1 (1947). Nor is the fact that a majority versus a minority, has passed a certain law, any indication of the constitutionality of that law or activity.

B. The Framers Of The First Amendment Intended To Protect Our Religious Liberties By Keeping Government Out Of Religion, Not Religion Out Of Government.

The First Amendment is not a two-way street. The First Amendment provides freedom *for* the Christian religion, not *from* the Christian religion. This Court has held that the total separation of church and state[24] is not possible in an absolute sense. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Indeed, the "First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State." *Zorach v. Clauson*, 343 U.S. 306 (1952). In fact, the First Amendment does not mention "separation" or the words "church and state" at all. The Constitution of the U.S.S.R. does, however, specifically speak of a separation of the church, the state, and the school.[25]

The Framers never intended that religion be justified in government on the basis of tradition or secular valida-

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[24] John W. Whitehead, *The Second American Revolution*, p. 100 (1982).

[25] U.S.S.R. Const. Art. 52.

tion. *Lynch v. Donnelly*, 465 U.S. 668 (1984). The First Amendment states that:

> "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof-." (emphasis added)

As this Court has previously noted, at the outbreak of the Revolutionary War, "there were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five." *Engel v. Vitale*, 370 U.S. 421 (1962). In addition, there were numerous specific attempts to amend the Constitution to apply the First Amendment to the states, however, such a piece of Congressional legislation has never been passed by Congress. Supreme Court Justice Story has noted:

> "The word 'Congress' has from the beginning been interpreted to mean the Federal government. The intent of the amendment was to provide an atmosphere in which the Judeo-Christian religion could flourish. It protected the Biblical legal base of our country, while at the same time it avoided a national church."[26]

Thus, the First Amendment was never meant by the Framers to apply to the states and their local governments. Our Founding Father George Washington stated the following in regards to the amendment process:

> "If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation."[27]

The First Amendment in the Bill of Rights stands as written by the Framers. This Court holds the power of review

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[26] Joseph Story, *Commentaries on the Constitution of the United States*, (2d ed. 1851), pp. 593-95.

[27] George Washington: Farewell Address, Sept. 17, 1796.

and correction. Our nation was not founded upon a "wall of separation between church and state." If such a wall exists, it is polarized to allow the flow of religion into government, and such a wall is not undermined, breached, or cracked by the Christmas display in St. Charles.

III.

THE CROSS IS PART OF THE HISTORIC CULTURE OF ST. CHARLES AND ITS USE IN THE CITY'S SEASONAL CHRISTMAS DISPLAY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

Although the *Lemon* test presupposes a neutrality requirement never intended by the Framers and effectively forecloses any religion in government, even the burdensome "tri-partite test" is satisfied should it be laid on the cross in St. Charles. However, Amicus would prefer that the Court disregard the *Lemon* analysis as it lacks historical support and is "all but useless as a guide to sound constitutional adjudication." *Wallace v. Jaffree*, 472 U.S. ____, 105 S.Ct. 2479, 2517 (1985) (Rehnquist, J., dissenting).

A. The Cross, As Part Of The City's Christmas Display, Serves A Secular Purpose.

Taken in the context of the Christmas Holiday celebration, the cross in the St. Charles Christmas display meets the secular purpose test. The display represents the historical truth that Christ was born and Christ died upon the cross. The Christian rejoices as both historical events. The historical reasons for celebrating the birth of Christ arise out of and are inseparable with Christ's redemption of mankind through His sacrifice upon the cross. The fact that religious expression takes place in the government sector does not grant courts a license to inquire into traditional ecclesiastical matters. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871), *United States v. Ballard*, 322 U.S. 78, 87 (1944). As this Court explained in *United States v. Ballard*:

> "Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the trier of fact undertake that task, they enter a forbidden domain."[28]

Although Christmas was not observed universally in the 13 colonies, it was recognized or observed in both of the earliest Virginia and Massachusetts settlements and was, in the words of dissenting Judge Campbell, "an ingrained part of our culture." *Donnelly v. Lynch*, 691 F.2d at 1038. While the cross is not as well-known as more traditional Christmas symbols such as a creche scene, Santa Claus, or the Christmas tree, there is some documentation of its use as a Christmas symbol since the pre-Victorian era.[29] In any event, the cross in the St. Charles Christmas display has appeared temporarily during the Christmas season for at least 15 years prior to this litigation for the purpose of celebrating the Christmas holiday. It merely acknowledges the advent of the Christmas holiday as one of the many traditional symbols that are part of our American heritage.

B. The Primary Effect Of The Cross, As Part Of The City's Christmas Display, Neither Advances Nor Inhibits Religion.

The overall and primary effect of the Christmas display is a secular message that the Christmas holiday is at

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[28] *United States v. Ballard*, 322 U.S. 78, 87 (1944).

[29] Clement A. Miles, *Christmas Customs and Traditions Their History and Significance*, p. 271 (1976), Gillian Cooke, *A Celebration of Christmas*, p. 66 (1981).

hand. The fact that the Christmas cross display may offend the religious sensibilities of some citizen(s), does not *ipso facto* imply endorsement by the Christian religion over others. "While government must be sensitive to the religious beliefs or disbeliefs of its citizens, it is not required to abandon common sense." *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 508 F.Supp. at 830 (D. Colo. 1981). Governmental action which provides only indirect, remote, or incidental benefits to a religion does not violate the Establishment Clause. *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984).

C. There Is No Entanglement Issue In This Case.

The district court which heard this issue summarily rejected any hint of entanglement in this case. The lower court concluded that, overall, "Whatever involvement St. Charles might have had with the display of the cross, it fell far short of Pawtucket's purchase, erection and illumination of the creche approved of in *Lynch*. *See also McCreary v. Stone*, 739 F.2d 716, 725 (2d Cir. 1984), *aff'd by an equally divided Court*, 105 S.Ct. 1859 (1985)." *ACLU v. City of St. Charles*, 622 F.Supp. 1542, 1546 (N.D. Ill. 1985). The Seventh Circuit Court of Appeals left the district court finding undisturbed. *City of St. Charles v. ACLU*, 794 F.2d 265 (7th Cir. 1986).

CONCLUSION

This Court has found no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). The City's action in support of a Christmas cross display is "simply a

tolerable acknowledgement of beliefs widely held among the people of this country," and is not *per se* an establishment of religion. *Marsh v. Chambers*, 103 S.Ct. at 3336. Moreover, the Constitution does not require "complete separation of church and state; it affirmatively mandates accommodation, not merely toleration, of all religions, and forbids hostility towards any." *Lynch v. Donnelly*, 465 U.S. 668 (1984).

The reasoning of the lower courts in this case departs from long-standing First Amendment values. It no longer takes a "fastidious" atheist or agnostic to circumvent our democratic process and disrupt the moral fabric of our society.[30] Anyone who asserts a particular preference may call for "neutralism" where there religious values conflict with the views of others in the public sphere.

The decision of the Court of Appeals blatantly conflicts with both the intentions of the Framers of the First Amendment and with fundamental constitutional principles. The St. Charles Christmas Cross Committee, as Amicus Curiae, pray, therefore, that this Honorable Court resolve this conflict in favor of the petitioners.

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[30] *Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952).